No. 79-6149

Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

JOSEPH W. SCHEER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES

WADE H. McCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

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MEMORANDUM FOR THE UNITED STATES

Petitioner contends (Pet. 5-10) that the Double Jeopardy Clause precludes the government from prosecuting him for unlawfully transporting monetary instruments out of the United States, because he has already been convicted for another crime (possession of cocaine with the intent to distribute) arising out of the same criminal episode.

1. On June 6, 1978, petitioner went to Colombia with approximately $20,000 in his possession to purchase cocaine. Petitioner purchased the cocaine and returned to the United States. A Customs agent discovered the cocaine in petitioner's unclaimed luggage in New York and notified DEA agents. The suitcase was then forwarded to its destination in Pittsburgh. When petitioner and Thomas Turney claimed the suitcase at the Pittsburgh airport, they were arrested.

On July 21, 1978, an indictment was returned (Cr. No. 78-174) in the Western District of Pennsylvania charging petitioner with possession of cocaine with the intent to distribute, in violation of 21 U.S.C. 841(a)(1). Petitioner entered a conditional plea of guilty following the denial of his suppression motion and was sentenced to a term of three and one-half years' imprisonment, to be followed by a three-year special parole term. The court of appeals affirmed (600 F.2d 5).

2. On March 9, 1979, petitioner was indicted in the Western District of Pennsylvania for transporting monetary instruments out of the United States without filing the required reports, in violation of 31 U.S.C. 1101. The $20,000 petitioner had in his possession when he departed for Colombia served as the basis for this charge. Petitioner moved to dismiss the indictment claiming that the second prosecution violated the Double Jeoparty Clause and that it also violated the Due Process Clause in that the prosecutor's action constituted governmental harassment. The district court denied the motion and petitioner appealed. See Abney v. United States, 431 U.S. 651 (1977). The court of appeals affirmed (Pet. App. 1a-2a).

3. The courts below correctly concluded that the indictment should not have been dismissed on double jeopardy grounds. See Brown v. Ohio, 432 U.S. 161, 166 (1977). However, as set forth in Petite v. United States, 361 U.S. 529, 530 (1960), it is the general policy of the federal government "'that several offenses arising out of a single transaction should be alleged and tried together and should not be made the basis of multiple prosecutions, a policy dictated by consideration both of fairness to defendants and of efficient and orderly law enforcement." Under the "Petite" policy, the Department of Justice will decline to bring a second prosecution for acts forming the basis for a prior prosecution, except where the second prosecution would advance compelling interests of federal law enforcement, and then only after specific approval by the appropriate Assistant Attorney General, or the Attorney General. The second indictment in this case was not authorized as required by the formal policy of the Department of Justice. Upon full consideration of the pertinent facts, the Department of Justice has determined that there are no compelling reasons justifying a second prosecution. Therefore, in accordance with the government's policy against

successive prosecutions in the circumstances presented here, we respectfully request the Court to grant the petition, to vacate the judgment of the court of appeals, and to remand the case to the district court with instructions to grant the motion to dismiss the indictment. See Thompson v. United States, No. 79-5180 (Jan. 14, 1980); Rinaldi v. United States, 434 U.S. 22 (1977); Watts v. United States, 422 U.S. 1032 (1975); Ackerson v. United States, 419 U.S. 1099 (1975); Hayles v. United States, 419 U.S. 892 (1974); Petite v. United States, supra.

Respectfully submitted.

WADE H. McCREE, JR.
Solicitor General

APRIL 1980